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2/1/08

In re Application of:  
Bianchi, John R. et al : DECISION ON PETITION  
Appl. No.: 10/699,175 :  
Filed: Oct. 31, 2003 :  
Attorney's Docket # MSDI-434/PC316.08 :  
For: OPEN INTERVERTEBRAL SPACER :

This is a decision on the petition filed Dec. 26, 2007 under 37 CFR 1.181 requesting supervisory review of the final office action mailed Nov. 5, 2007. Petitioner requested reconsideration of the finality of the office action.

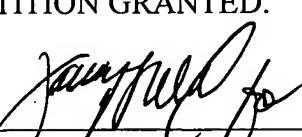
The petition is **Granted**.

Petitioner requests that the finality of the office action mailed Nov. 5, 2007 be withdrawn because the new ground of rejection to the un-amended claims 134, 269 and 292 were not necessitated by the amendment filed on Oct. 18, 2007.

It is noted in the amendment of Oct. 18, 2007, the applicant did not amend claims 134, 269 and 292. The examiner introduced new art to reject the un-amended claims 134, 269 and 292. Therefore, the rejection of at least claims 134, 269 and 292 under 35 U.S.C. 102(e) as anticipated by Pafford et al (6,371,988) was not necessitated by amendment of Oct. 18, 2007. As such, the Nov. 5, 2007 final office action is premature and thus the finality of the action is hereby withdrawn. The period to respond to the Office action of Nov. 5, 2007 remains unchanged. Since the finality is being withdrawn, any amendment responding to the Office action dated Nov. 5, 2007 will be treated as a 37 CFR § 1.111 amendment.

Any questions regarding this decision should be directed to Special Program Examiner, Henry Yuen, at 571-272-4856.

**PETITION GRANTED.**

  
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Frederick R. Schmidt, Director  
Technology Center 3700